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Supreme Court of the United States

October Term, 1978

No. 79-329

RALPH J. SKINKISS,
Appellant,

vs.

OWENS-CORNING FIBERGLAS CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

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Supreme Court of the United States

October Term, 1978

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RALPH J. SKINKISS,
Appellant,

vs.

OWENS-CORNING FIBERGLAS CORPORATION,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

MOTION TO DISMISS

The Appellee respectfully moves the Court to dismiss the appeal herein, on the grounds that it does not present a substantial federal question; that the federal questions sought to be reviewed were not timely or properly raised, or expressly passed on; and that the judgment below rests on adequate state grounds.

QUESTION PRESENTED

Whether Rule 4(A), Ohio Rules of Appellate Procedure, which requires that a notice of appeal be filed "within thirty days of the date of the entry of the judgment or order appealed from," is so vague and indefinite as to violate the Due Process or Equal Protection clauses of the Fourteenth Amendment?

STATEMENT OF THE CASE

Appellant Ralph Skinkiss, a patent attorney, brought this action in the Court of Common Pleas of Lucas County, Ohio against his former employer, appellee Owens-Corning Fiberglas Corporation ("Owens-Corning"), claiming that he was wrongfully discharged in breach of an alleged employment contract.

1. Proceedings in the Trial Court

After discovery Owens-Corning moved for summary judgment, which the trial court granted by an entry which concluded by stating that "Plaintiff's cause is hereby dismissed with prejudice with plaintiff to pay the costs."[1] This entry, which we will call the "February 16th entry," was duly filed on that date with the clerk of the court for journalization.[2]

Owens-Corning then moved the trial court for findings of fact and conclusions of law, and appellant moved for rehearing. Neither motion would have served to interrupt

1. Order of the Court of Common Pleas dated February 15, 1978, filed February 16, 1978, Exhibit D-1 of appellant's Jurisdictional Statement Appendix (hereinafter cited "Appellant's Appendix"). The copy in appellant's exhibit does not show the filing date stamp. The February 16th filing date is reflected in the Court of Appeals' Decision of December 22, 1978, Appellant's Appendix, C-1.

2. Rule 58, Ohio Rules of Civil Procedure, provides that judgments shall be signed by the court, entered by the clerk, and are effective when filed with the clerk for journalization. There is no requirement that judgments be "set forth on a separate document," compare Rule 58, Federal Rules of Civil Procedure. A requirement that judgments be "specifically designated" as such was contained in Ohio Civil Rule 58 as originally adopted in 1970, but was deleted by amendment in 1971. A copy of the current version of the rule is set forth in the Appendix of this Motion.

the running of the thirty days' time to appeal, if the February 16th entry were taken as a judgment.[3]

Subsequently, and more than thirty days after February 16th, the trial court entered findings of fact and conclusions of law with respect to its ruling on the motion for summary judgment,[4] and overruled appellant's motion for rehearing.[5] Appellant then gave notice of appeal to the Court of Appeals for Lucas County, Ohio.

2. Proceedings in the State Court of Appeals

After the parties had briefed the merits and prior to scheduled oral argument, the court of appeals acted *sua sponte* to dismiss the appeal for lack of jurisdiction, on the ground that the February 16th entry was a judgment, and that the notice of appeal was not timely filed as required by Ohio Appellate Rule 4(A).[6]

Appellant then moved for reconsideration, contending that the court of appeals had mistakenly applied Rule 4(A) with reference to the facts of the case, and that in ruling *sua sponte* the court had denied rights of due process and equal protection guaranteed by the Ohio and United States constitutions.[7] But appellant did not complain to the court of appeals that Rule 4(A) was itself unconstitutional, or otherwise invalid.

3. See Rule 4(A), Ohio Rules of Appellate Procedure, Appellant's Appendix, G-1, *Bond & Associates v. Airway Development Corp.*, 54 Ohio St. 2d 363, 377 N.E.2d 988 (1978).

4. Order of the Court of Common Pleas filed April 17, 1978, Appellant's Appendix, D-8.

5. Order of the Court of Common Pleas filed April 17, 1978, Appellant's Appendix, D-12.

6. Court of Appeals Decision, December 22, 1978, Appellant's Appendix, C-1.

7. Appellant's Request for Reconsideration, filed January 3, 1979, Jurisdictional Statement, 11, 19.

3. Proceedings in the Supreme Court of Ohio

Appellant then gave notice of appeal to the Supreme Court of Ohio. The civil jurisdiction of that court is limited to cases involving constitutional questions, which are brought up on appeal, and to cases of public or great general interest, brought up by motion to certify the record.[8] These jurisdictional matters are addressed first, before the court proceeds to any hearing of the merits.[9] In this case the Supreme Court of Ohio ruled both to dismiss the appeal for lack of a substantial constitutional question,[10] and to overrule the motion to certify.[11]

4. Proceedings in This Court

Appellant has given notice of appeal to this Court. His Jurisdictional Statement, including a motion for summary reversal, was submitted for filing by typewritten papers on August 7, 1979. On August 29, 1979, appellant submitted his Jurisdictional Statement in papers accepted for filing, not containing any motion for summary reversal. We assume that such motion is not now before the Court, if it ever was.

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8. Constitution of the State of Ohio, Art. IV, §2.

9. Rules of Practice, Supreme Court of Ohio, Rule II.

10. Order of the Supreme Court of Ohio, April 12, 1979, Appellant's Appendix, B-1.

11. The motion to certify was overruled by Order entered the same day, April 12, 1979. The Order is omitted from Appellant's Appendix.

ARGUMENT

APPELLANT'S CLAIMED FEDERAL QUESTIONS WERE NOT TIMELY OR PROPERLY RAISED BELOW, AND ARE NOT SUBSTANTIAL. THE JUDGMENT APPEALED FROM RESTS ON ADEQUATE STATE GROUNDS.

Final judgments rendered by the highest court of a state may be reviewed by this Court:

> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity," 28 U.S.C. §1257.

The only state "statute" of which appellant has complained in his Jurisdictional Statement is the Ohio Rules of Appellate Procedure,[12] and specifically Rule 4(A). But the validity of Rule 4(A) was not drawn in question before the state court of appeals, where appellant's only claim of constitutional violation was in respect to that court's acting *sua sponte* to raise the question of Rule 4(A)'s applicability.[13] Appellant did present to the Ohio Supreme Court a claim that the Ohio Rules of Appellate Procedure were unconstitutionally vague, citing the Fourteenth Amendment.[14] But this claim was not properly

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12. We assume, arguendo, that the Rules are a "statute" within the meaning of 28 U.S.C. §1257, see *John P. King Mfg. Co. v. City of Augusta*, 277 U.S. 100, 104 (1928); *cf. Mayer v. City of Chicago*, 404 U.S. 189, 193 (1971).

13. Appellant's Request for Reconsideration, filed January 3, 1979, Jurisdictional Statement, 11, 19.

14. Appellant's "Memorandum in Support of the Appeal," filed in the Supreme Court of Ohio February 2, 1979, Jurisdictional Statement, 12.

presented, since the Ohio Supreme Court does not pass on issues not raised below, *Village of Clarington v. Althar*, 122 Ohio St. 608, 174 N.E. 251 (1930); *City of Toledo v. Reasonover*, 5 Ohio St. 2d 22, 213 N.E.2d 179 (1965); see *Beck v. Washington*, 369 U.S. 541, 550 (1962); *Michigan v. Tyler*, 436 U.S. 499, 512, n.7 (1978).

The Ohio Rules of Appellate Procedure were patterned after the Federal Rules of Appellate Procedure adopted by this Court in 1967, 389 U.S. 1065. Ohio Appellate Rule 4(A) is substantially the same as Federal Appellate Rule 4(a), in the respect of which appellant complains. Neither rule undertakes to say what constitutes a judgment: each simply limits time for filing notice of appeal - "thirty days from the date of the entry of the judgment or order appealed from." In Ohio, as in the federal system, other sources of law give definition to what is effectively a "judgment" for purposes of applying the limitation, see, e.g., *Millies v. Millies*, 47 Ohio St. 2d 43, 350 N.E.2d 675 (1976); *United States v. 1,431.80 Acres of Land*, 466 F.2d 820 (8th Cir., 1972). Judicial construction of the Rule "destroys the contention that it is too vague and indefinite to constitute valid legislation," *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270, 274 (1940). Thus, even if the contention appellant here makes in respect to Rule 4(A) had been timely and properly raised, and expressly rejected by the courts below, it would not present a substantial Fourteenth Amendment question.

Appellant makes other federal constitutional claims, not involving the validity of any state court rule or state statute. He complains that the state court of appeals' dismissal *sua sponte* for lack of jurisdiction, where that issue had not been raised by the opposing side "and appellant was not otherwise afforded the opportunity to present argument against such dismissal," was a denial of "proce-

dural due process" guaranteed by the Fourteenth Amendment.[15] But in fact appellant *was* afforded an opportunity to argue against the dismissal by the appellate court's procedure upon motion for rehearing, a procedure which appellant invoked.

Again, appellant would attack on Fourteenth Amendment grounds the state court of appeals' refusal to recognize the trial court's orders subsequent to the February 16th entry—orders by which the trial court entered findings and conclusions and overruled appellant's motion for rehearing—as being the true "judgment" for purposes of the running of time to appeal.[16] But this is a question of state law, and the mere contention that it was wrongly decided does not give rise to an issue under the Fourteenth Amendment, *American Railway Express Co. v. Kentucky*, 273 U.S. 269, 273 (1927).

Finally, appellant would complain here of errors by the trial court in granting summary judgment, an action which necessarily concluded the case without jury trial.[17] That complaint was not passed upon by either of the state appellate courts, and it is not properly before this Court.

Rule 16(b) of the Court's Rules of Practice provides as follows:

> "(b) The court will receive a motion to dismiss an appeal from a state court on the ground that it

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15. Proposition II of appellant's "Questions Presented," Jurisdictional Statement, 6.

16. Proposition IV of appellant's "Questions Presented," Jurisdictional Statement, 7.

17. Proposition III of appellant's "Questions Presented," Jurisdictional Statement, 6.

does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

Each of these grounds is present here.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

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APPENDIX

OHIO RULES OF CIVIL PROCEDURE

Rule 58

ENTRY OF JUDGMENT

Subject to the provisions of Rule 54(B), upon a general verdict of a jury, or upon a decision announced, the court shall promptly cause the judgment to be prepared and, the court having signed it, the clerk shall thereupon enter it. A judgment is effective only when filed with the clerk for journalization. Entry of the judgment shall not be delayed for the taxing of costs.